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No. 93-685

In The

Supreme Court Of The United States

October Term, 1993

ATLANTIC HEALTHCARE BENEFITS TRUST, NATIONAL INSURANCE CONSULTANTS, INC. UNITED HEALTHCARE ASSOCIATION OF AMERICA ET AL.,

Petitioners

v.

ROBERT R. GOOGINS, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF THE STATE OF CONNECTICUT ET AL.,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether 29 U.S.C. § 1144(b)(6)(A)(ii) allows the State of Connecticut to regulate self-funded Multiple Employer Welfare Arrangements (MEWAs) under its insurance laws, including its registration scheme for insurance companies.

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COUNTERSTATEMENT OF THE CASE

The relevant facts and proceedings in this case are essentially undisputed as found in the Second Circuit's opinion, now reported as *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1 (2d Cir. 1993).

The issue below was one of statutory construction involving the so-called MEWA exemption to the

Employee Retirement Income Security Act ("ERISA"). The term "MEWA" stands for Multiple Employer Welfare Arrangement which includes plans "established or maintained" for the purpose of offering certain benefits, including health care, "to the employees of two or more employers ... or their beneficiaries." 29 U.S.C. § 1002(40)(A).

The Petitioners, United Healthcare Association of America ("United") and Atlantic Healthcare Benefits Trust ("Atlantic"), alleged that they were a self-funded MEWA subject to ERISA. Shortly after Connecticut's Insurance Commissioner began investigating the sale of health care benefits by the Petitioners, they sued claiming that ERISA preempts the Commissioner's authority to regulate MEWAs and that any attempt to subject this self-funded MEWA to the state registration scheme for insurance companies (or any other insurance regulatory provision) was unlawful.

In upholding the District Court's grant of summary judgment in favor of the Commissioner, the Court of Appeals agreed with the State and the United States Department of Labor as *amicus* that 29 U.S.C. § 1144(b)(6)(A) (the "MEWA clause") is an express exception to ERISA's broad preemption language, and it authorizes the states to regulate MEWAs as insurance companies. The Second Circuit's decision in this matter was quickly followed by the Third Circuit in *Atlantic Health Care Benefits Trust v. Foster,* 809 F.Supp. 365

(M.D. Pa. 1992), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993).

The MEWA provisions were added to ERISA in 1983 in response to what the co-sponsor of the amendment called "an increasing problem having the potential to become the 'most sophisticated and profitable white-collar crime in America.' In a growing number of states across the nation, operators of bogus insurance trusts are bleeding the trusts of funds and claiming bankruptcy, thus leaving thousands of people holding the bag for millions of dollars in unpaid hospital and medical bills." 128 Cong. Rec. H30356-57 (daily ed. Dec. 13, 1982) (statement of Rep. Erlenborn).[1/] Congress responded by exempting multiple employer welfare arrangements from ERISA preemption and subjecting them to state insurance laws. The MEWA exemption states, "Notwithstanding any other provision of this [preemption] section," fully insured MEWAs which are employee welfare benefit plans are subject to

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1/ Continuing abuses by MEWAs are graphically documented in two recent federal reports. *See* U.S. Senate, Committee on Government Affairs, Permanent Subcommittee on Investigations -- Interim Report on Combatting Fraud and Abuse in Employer Sponsored Health Benefit Plans, 102nd Cong., 2nd Sess., Mar. 12, 1992 (typical MEWA fraud is a classic ponzi scheme); U.S. General Accounting Office, Report to Reps. Pickle, Hughes, and Boehlert, Doc. No. B-242197. (Between 1988 and 1991 MEWAs left at least 398,000 people with over $123 million in unpaid claims.)

state regulation covering reserves and contributions. 29 U.S.C. § 1144(b)(6)(A). For less than fully insured plans, like the Petitioners', the exemption continues by providing that

> (ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any state which regulates insurance may apply to the extent not inconsistent with the preceding sections of this chapter.

29 U.S.C. § 1144(b)(6)(A) (emphasis added).

After examining the language of the statute, its legislative history, and pertinent cases, the Court of Appeals concluded that, having alleged that Petitioners' health care plan is a self-funded MEWA, it comes within the terms of the above-quoted section and is subject to the State of Connecticut's insurance laws. The Court found further that nothing in ERISA prevents the application of state statutes requiring a license.

REASONS FOR DENYING THE WRIT

The Petitioners have advanced no persuasive argument that would warrant this Court's review of this case. There is no split among the circuits on any issue raised in this case, and the Second Circuit's decision in no way conflicts with any decision of this Court. No important question of federal law is raised that has not

been settled, and the result below was undoubtedly correct.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S APPLICABLE DECISIONS

The Petitioners seek desperately to manufacture a conflict between the Second Circuit's decision and this Court's decision in *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), in which the Court described the interplay between ERISA's so-called "preemption," "saving," and "deemer" clauses. The Court stated:

> [ERISA's] pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

Id.

The Court went on to hold that a Pennsylvania statute that regulated a single employer self-funded employee welfare benefit plan violated ERISA's deemer clause, and was therefore preempted by ERISA. *Id.*

The Petitioners contend that *FMC* stands for the proposition that ERISA preempts all state insurance laws regarding any self-funded benefit plan. This argument totally ignores the MEWA amendment which created an exception to ERISA's preemption, saving, and deemer clauses for multiple employer plans. *FMC* concerned a distinction between self-funded and fully insured single employer plans. As the Second Circuit noted, however, "there is a decisive distinction ... between the single employer plan at issue in *FMC* and an arrangement for administering the health plans of multiple employers, i.e., MEWAs." *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1, 5 (2d Cir. 1993). Thus, there is no conflict between the Second Circuit's decision in this case and this Court's holding in *FMC*.

II. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL THAT REQUIRES THIS COURT'S ATTENTION

This case does not call upon this Court to settle a split of authority among the Circuit Courts of Appeal. In fact, in the only federal appellate court decision addressing the issue presented here, the Third Circuit agreed with the Second Circuit's judgment in this case. *See Atlantic Health Care Benefits Trust v. Foster*, 809 F.Supp. 365, 374-75 (M.D. Pa. 1992), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993). Moreover, the Petitioners' claim that *United Wire v. Morristown Memorial Hospital*, 995 F.2d 1179 (3d Cir. 1993), conflicts with the Second

Circuit's ruling in this case is simply wrong. It does not concern MEWAs or 29 U.S.C. § 1144(b)(6)(A), the statute at issue here, but rather dealt with 29 U.S.C. § 1144(a), ERISA's general preemption clause.

III. THE DECISION BELOW CORRECTLY INTERPRETED THE RELEVANT STATUTORY PROVISIONS AND NO "SPECIAL AND IMPORTANT" REASONS WARRANT THIS COURT'S CONSIDERATION

The Second Circuit's decision is correct on the merits, finding support in the statutory language, this Court's decisions, and the legislative history of the MEWA amendment. Further, the Secretary of Labor, who is responsible for enforcing the reporting, disclosure, and fiduciary requirements imposed on private employee benefit plans under ERISA, participated as *amicus curiae* in the Court below and supported the defendants' position. This Court has accorded deference to the Secretary's interpretation of ERISA's provisions. *See Massachusetts v. Morash*, 490 U.S. 107, 116, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) (Secretary of Labor's views regarding interpretation of ERISA entitled to deference).

This case does not involve any weighty constitutional issues and is essentially a straightforward matter of statutory construction. 29 U.S.C. § 1144(b)(6)(A) -- the MEWA exemption -- begins: "Notwithstanding any other provision of this section...." Thus, Congress' intent to exclude MEWAs from the earlier preemption

provisions of 29 U.S.C. § 1144, including the "savings" and "deemer" clauses, could not be clearer. *See National Business Association Trust v. Morgan*, 770 F.Supp. 1170, 1176 (N.D. Ky. 1991) (the "plain and unambiguous language of 29 U.S.C. § 1144(b)(6)(A)(ii)" makes self-funded MEWAs subject to state laws that regulate insurance provided not inconsistent with Title I of ERISA). The Petitioners' argument that the "deemer" clause still applies to MEWAs not only contravenes the plain language of the MEWA exemption but would render it totally meaningless.

The legislative history of the MEWA amendment makes clear that it was intended to permit states directly to regulate MEWAs under their insurance laws, which the "deemer" clause would otherwise prevent. *See* 128 Cong. Rec. H303566-57 (daily ed. Dec. 13, 1982) (statement Rep. Erlenborn) (non-fully insured MEWAs subject to ERISA and whatever state law may apply, except to the extent that state law may be inconsistent with Title I of ERISA); *see also* H.R. Conf. Rep. 984, 97th Cong., 2nd Sess. (1982), *reprinted in* 1982 U.S. Cong. & Ad. News 4598, 4604.

Finally, the Petitioners' argument that requiring a self-funded MEWA to obtain a certificate of authority or license to do business as an insurance company is inconsistent with Title I ERISA is simply unsupported. Aside from conclusory statements, they have failed to show any such inconsistency. Unlike the comprehensive regulations imposed on pension plans, "ERISA 'does

not regulate the substantive content of employee welfare benefit plans.'" *MDPhysicians & Associates, Inc. v. Wrotenbury*, 762 F.Supp. 695, 699 (N.D. Tex. 1991), *aff'd*, 957 F.2d 178 (5th Cir. 1992), quoting *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732, 105 S. Ct. 2380, 85 L.Ed.2d 728 (1985). The cases and legislative history make clear that Congress intended to regulate multiple employer plans to prevent fraud and abuse, by deferring to state insurance laws in the MEWA exemption, including requirements for a license or certificate of authority to transact an insurance business. *Atlantic Health Care Benefits Trust v. Foster*, 809 F.Supp. 365, 374 (M.D. Pa. 1991), *aff'd*, No. 93-7052 (3d Cir. August 23, 1993); *MDPhysicians & Associates, Inc. v. Wrotenbury*, 762 F.Supp. 695, 699 (N.D. Tex. 1991) *aff'd*, 957 F.2d 178 (5th Cir. 1992) (requirement that plan obtain an insurance license is not inconsistent with ERISA). This is also the position of the Secretary of Labor. Secretary of Labor Advisory Opinion, 90-18A (July 2, 1990).

In sum, the Petitioners have failed to show any conflict between state insurance laws and Title I of ERISA.

CONCLUSION

For all of the reasons recited above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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